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In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT E. RUBIN, SECRETARY OF THE TREASURY, AND LEWIS C. MERLETTI, DIRECTOR OF THE UNITED STATES SECRET SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Petitioners seek this Court's review to determine whether, under Rule 501 of the Federal Rules of Evidence, a protective function privilege should be recognized in response to grand jury subpoenas for the testimony of Secret Service agents and officers concerning information they learned while in proximity to the President of the United States for the purpose of protecting him. The Independent Counsel has opposed the petition based on two rationales: (1) there is "the compelling national interest in prompt completion" of his ongoing grand jury investigation (Br. in Opp. 12; see *id.* at 13); and (2) the privilege asserted, in his view, lacks merit (*ibid.*). The Independent Counsel's reasoning is unsound, and it ignores the important role that the relationship of trust and confidence plays in protecting the safety of those who hold the Office of the President, which is an institutional interest of the highest order.

1. The Independent Counsel urges that "[t]he petition should be denied because of the need for expeditious com-

pletion of [his] investigation." Br. in Opp. 13. There is no longer any basis for that argument. The Chief Justice has denied petitioners' application for a stay pending resolution of the petition for a writ of certiorari, reasoning that "if the Secretary's claim of privilege is eventually upheld, disclosure of past events will not affect the President's relationship with his protectors in the future." *Rubin* v. *United States, Acting through the Independent Counsel*, No. A-53 (98-93) (July 17, 1998) (Rehnquist, Circuit Justice), slip op. 1. Since the denial of the stay, the Independent Counsel has obtained the full cooperation of the Secret Service in providing testimony that would fall within the protective function privilege.

In light of that cooperation, the Court's consideration of the issue presented will not interfere with the Independent Counsel's ongoing investigation. To the contrary, the denial of a stay enables the parties and the Court to focus their attention on the long-term consequences of the issue at stake in this litigation, rather than on its immediate consequences for the parties. Those long-term consequences are precisely what have motivated the Secretary of the Treasury, the Director of the Secret Service, and the Attorney General throughout this litigation: If the courts refuse to recognize the protective function privilege, the resulting destruction of the relationship of confidence and trust between a President and his protectors will seriously impair the Service's future ability to protect those who serve as the Nation's Chief Executive. See Pet. App. 37a-95a (Declarations of Director Merletti, former Directors Eljay B. Bowron and John W. Magaw, and Secretary Rubin). That fundamental concern remains one of great importance warranting review of the case by this Court, and the parties and the Court are now in a position to address it in the fully deliberative manner that an issue relating to the safety of the President of the United States plainly deserves, separated from the pressures occasioned by the imperatives of the ongoing investigation. Indeed, the Chief Justice, even as he denied our application for a stay, observed that "[t]his case is obviously not a run-of-the-mine dispute, pitting as it does the prosecution's need for testimony before a grand jury against claims involving the safety and protection of the President of the United States," and he "assume[d], without deciding, that four members of this Court on that basis would grant certiorari." Slip op. 2.*

2. On the merits, the Independent Counsel argues that recognition of a protective function privilege here would be inconsistent with (a) "this Court's traditional considerations under Federal Rule of Evidence 501"; (b) "the statutory disclosure obligations imposed by Section 535(b) of title 28"; and (c) "an assortment of compelling public policy considerations." Br. in Opp. 13. The Independent Counsel's arguments are incorrect, and individually and in combination they provide no persuasive reason for denying the petition.

a. The Independent Counsel argues that the protective function privilege is not justified under the "traditional considerations" governing Rule 501 because the privilege is not "either historically rooted in law or accepted by a vast majority of States." Br. in Opp. 14-16. The court of appeals rejected that argument, and properly so. As the court of appeals explained:

> [T]he OIC makes much of the lack of relevant federal or state precedent for the protective function privilege. The lack of such precedent is hardly surprising,

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* Consistent with that view of the effect of disclosure of past events, and to minimize any incentive for the President to distance himself from Secret Service agents and officers in the future, the Independent Counsel has undertaken, at least until this Court issues a final ruling, not to question agents and officers about on-duty "protective function" observations that occur after the date on which the brief in opposition was filed. See Br. in Opp. 12.

> however, in view of the novelty of the OIC's demand for testimony: This appears to be the first effort in U.S. history to compel testimony by agents guarding the President. Although analogies can be drawn to state Governors and their protectors, the consequences of assassination (and hence the necessity of suitable protection) are so much greater at the presidential level that such analogies offer little guidance. In these circumstances, we do not regard the absence of precedent as weighing heavily against recognition of the privilege.

Pet. App. 6a. The question therefore is whether the privilege should now be recognized in order to safeguard the relationship of trust and confidence between the President and those charged by Act of Congress with protecting his life and safety. The record in this case, consisting of the sworn declarations of the current Director of the Secret Service and his two immediate predecessors, firmly establishes the basis for the privilege. That record is uncontradicted, because the Independent Counsel chose to introduce no evidence whatever to the contrary.

b. The Independent Counsel next argues that the protective function privilege is not available for the "separate reason" that Section 535(b) would require disclosure of information that Secret Service personnel have "relating to violations of title 18 involving Government officers and employees" (28 U.S.C. 535(b)) to the Independent Counsel. Br. in Opp. 16. The court of appeals, however, did not resolve whether the Independent Counsel's construction of Section 535(b) is correct. Pet. App. 13a. The court of appeals had good reason to avoid the question, because Section 535(b) sheds no light on the protective function privilege.

Section 535(b) imposes, on "the head of the department or agency," an affirmative obligation to report the specified information to the Attorney General. Any such reporting could have no effect on the ability of the government to assert a privilege, including a protective function privilege, because the officer to whom the information must be reported—the Attorney General—is herself the lawyer for the Executive Branch. Indeed, it is the Attorney General who ordinarily is responsible for deciding (after weighing the relevant considerations) whether to assert or waive a governmental privilege in litigation. And here, the Attorney General has specifically determined that the privilege should be asserted. Cf. 28 U.S.C. 535(b)(2) (exemption from reporting requirement where "the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint").

Moreover, Congress enacted Section 535(b), long before Congress created the Office of Independent Counsel, to clarify whether the Attorney General may investigate "alleged irregularities on the part of Government officers and employees." H.R. Rep. No. 2622, 83d Cong., 2d Sess. 3 (1954). Its background therefore does not suggest that it was intended to address any question of privilege. Nothing in the policies and purposes of Section 535(b), for example, suggests that when a government agency provides in-house psychotherapists to counsel agency employees, a privilege may not be recognized that would permit those psychotherapists to decline to disclose information learned in the course of ostensibly confidential counseling sessions. See *Jaffee* v. *Redmond*, 518 U.S. 1 (1996). Section 535(b) similarly does not speak to the protective function privilege at issue here. Rather, in enacting that provision, Congress continued to leave the question of the assertion of privileges to the Attorney General. See Pet. 25 n.3.

c. The Independent Counsel recites a series of reasons why, in his view, the protective function privilege is not necessary. Br. in Opp. 13-20. The Independent Counsel's cursory recitation rests on speculation that has no foun-

dation in professional expertise and experience in safeguarding the life of the President. Indeed, the Independent Counsel's suppositions are at odds with sworn statements of persons who are directly responsible for protecting the President from assassination. See Pet. 15-17.

The Independent Counsel begins by suggesting that, in the absence of the privilege, the President would not push away his protectors because he has an obligation under 18 U.S.C. 3056(a) (1994 & Supp. II 1996) to accept Secret Service protection. Br. in Opp. 18. The creation of the statutory obligation to accept Secret Service protection, however, does not resolve every detail of that protection or purport to address the subtle (and often unconscious) interactions between the President and the individual agents and officers who are assigned to protect him. Furthermore, 18 U.S.C. 3056(a) necessarily grants the President a measure of discretion, both as protectee and as the constitutional officer ultimately responsible for faithful execution of the laws.

The Independent Counsel also argues that the President will not push away his protectors because he should have a strong personal interest in his own safety. Br. in Opp. 18. History establishes, however, that Presidents do not adequately assess their own security needs, and as Director Merletti explained, "even the most subtle (perhaps even unconscious) efforts to push away the protective envelope could have disastrous, even deadly, effects upon a President." See Pet. App. 57a; Pet. 18-19. Similarly, there is no merit to the Independent Counsel's argument that the President has "ample privacy within the White House compound." Br. in Opp. 18. The court of appeals did not limit its rejection of the protective function privilege to Secret Service officers posted within the White House. Furthermore, as we explain in the petition, the President has faced serious threats to his safety at the White House as well as when traveling. Pet. 19-20.

The Independent Counsel additionally contends that the protective function privilege "should have no effect on the President who 'act[s] within the law.'" Br. in Opp. 19. That argument overlooks the fact that a President may legitimately seek to maintain confidentiality about matters that are entirely lawful, including matters affecting sensitive personal, family, or political concerns. The Independent Counsel has never suggested that questioning of Secret Service agents and officers before the grand jury, in this or future investigations, would be limited to observations of criminal misconduct. To the contrary, under the standards that govern grand jury investigations as a general matter, prosecutors and grand jurors may inquire into matters that are only tangentially relevant to the subject of their investigations. Cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (a grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurances that it is not").

The Independent Counsel relies on the fact that the Secret Service does not require Secret Service personnel to sign confidentiality agreements as a condition of employment and that, as a result, some Secret Service agents have recounted privileged observations without sanction. Br. in Opp. 19. As we explain in the petition, the Secret Service has heretofore relied on a professional code of honor to maintain confidences, and the rarity of violations during a century of Secret Service protection underscores the extent to which a President may justifiably rely on adherence to that code by both current and former agents and officers even in the absence of confidentiality agreements. Pet. 20-21. There is, in any event, no basis for the Independent Counsel's extraordinary assertion that Secret Service's reliance on a code of honor "simply exposes the contrived, tailored-for-the-occasion nature of the privilege claim." Br. in Opp. 19.

The Independent Counsel argues that a President's inability to control the privilege after he leaves office "shows that the privilege cannot meet its stated goals." Br. in Opp. 19. That is not so. As explained in our petition, a former President has no legal right to exercise personal control over an institutional privilege, but he can reasonably anticipate that future Presidents will respect the Secret Service's ongoing institutional need to preserve every past President's expectation of confidentiality in order to ensure a future relationship of confidence and trust. Pet. 23-24.

The Independent Counsel, like the court of appeals, also relies on statements by former Presidents Ford and Carter, outside the record, respecting the need for a protective function privilege. Br. in Opp. 19-20. Contrary to the Independent Counsel's representations, those Presidents did not state that "there should be no protective function privilege in criminal proceedings." *Ibid.* Rather, President Ford, whose views President Carter endorsed, appeared to support a qualified privilege, based on a court's "judgment as to what is a legitimate area" of inquiry in criminal cases. See Transcript of *Hardball with Chris Mathews* (CNBC television broadcast, June 4, 1998).

The Independent Counsel is additionally mistaken in suggesting that the protective function privilege would be in "irrational asymmetry" with the executive privilege at issue in *United States* v. *Nixon*, 418 U.S. 683 (1974). Br. in Opp. 20. There is no reason why two distinct privileges that are founded on different policy concerns should be coextensive. We urge that the protective function privilege, unlike executive privilege, should be absolute where it applies, but the protective function privilege involves a far narrower scope of application than executive privilege. It comes into play only in response to requests for Secret Service testimony concerning information that Secret

Service agents or officers have learned while in close proximity to the President for the purpose of protecting him.

Finally, contrary to the suggestion of the Independent Counsel (Br. in Opp. 20), there is no inherent contradiction between the rationale for the privilege and the limitation on the privilege proposed by the Secret Service. The Secret Service has determined, based on its assessment of the Secret Service's law enforcement responsibilities, that the privilege should not extend to a Secret Service agent's contemporaneous recognition of a felony. The primary responsibility of Secret Service agents assigned to protect the President is to ensure the President's safety and not to investigate the possible commission of crimes. Nevertheless, the Secret Service has concluded that the President should reasonably expect that, while the Secret Service would generally assert the protective function privilege to preserve the President's confidences, the Secret Service would not assert the protective function privilege if a Secret Service agent observed the President or another commit a felony. As we explain in the petition, that exception strikes a reasonable accommodation between a Secret Service agent's protective and law enforcement roles. Pet. 21.

3. The Independent Counsel has previously represented to this Court, in filing a petition for a writ of certiorari before judgment, that the claims of privilege in this case are of "paramount importance to the country," that "all readily agree that the physical safety of the President is a matter of urgent national and public concern," and that "only this Court has the moral authority and public credibility to issue a final ruling on what the Secret Service plainly believes is a sensitive, life-or-death issue." 97-1942 OIC Pet. (redacted version) 9-10. The Independent Counsel now attempts to characterize those unambiguous representations of his view of this Court's distinctive role in this case as merely predictions about whether the Se-

cret Service would continue to adhere to its professional judgment regarding the measures necessary to protect the safety of the President. Br. in Opp. 17. The Court's decision whether to grant the government's petition should not turn on such rhetorical contortions. The Independent Counsel was right the first time in taking the considered position that the privilege issue warrants review by this Court. We disagreed with him only on whether the issue warranted the extraordinary procedure of certiorari before judgment. The Court concluded that it did not and denied review "without prejudice." *United States* v. *Rubin*, No. 97-1942 (June 4, 1998). Now that the court of appeals has completed its expeditious review of the case, the matter is ripe for review by this Court.

The government seeks this Court's review based on real world considerations of presidential safety. The Secretary of the Treasury and the Director of the Secret Service have determined, based on professional judgment and experience set forth in the record, that the protective function privilege is needed to protect Presidents from an unacceptable risk of assassination. The Nation's long-term institutional interest in avoiding the calamitous consequences of that occurrence provides a compelling basis for recognizing the privilege. The question presented here warrants review by this Court.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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